

Huang (Migration) [2018] AATA 4325 (27 September 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss Ying Lin Huang
CASE NUMBER:	1618468
DIBP REFERENCE(S):	BCC2016/3354610
MEMBER:	Margie Bourke
DATE:	27 September 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2) and cl.820.221 of Schedule 2 to the Regulations; and • r.2.03A

Statement made on 27 September 2018 at 3:40pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – de facto partner of sponsor – employment history – employed by the same employer – joint bank accounts – evidence by family members – birth certificate of child – married relationship – resided together – registered relationship – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss5CB, 65
Migration Regulations 1994 (Cth), rr 1.09A, 2.03A, Schedule 2 cls 820.211, 820.221

CASES

Bretag v MILGEA [1991] FCA 582

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 19 October 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 10 October 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the applicant had provided sufficient evidence to demonstrate she was the de facto partner of the sponsor at the time of application.
4. I have considered the Departments decision record dated 19 October 2016 and the extensive amount of information and evidence provided by the applicant to the tribunal. I am of the view that the tribunal can make a decision favourable to the applicant pursuant to s.360(2) based on the information available to the proceeding to a hearing. The following are the written reasons for the tribunal's decision to remit the matter to the Department for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

5. The main issues in the present case is whether the applicant is the de facto partner of the sponsor at the time of application, and the spouse of the sponsor at the time of decision.

SPOUSE/DE FACTO (cl.820.211(2)(a), cl.820.221)

Whether the parties are in a spouse or de facto relationship

6. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. Based on the sponsors New South Wales birth certificate, and the change of name certificate dated 14 June 2007, I am satisfied that the sponsor is an Australian citizen by birth. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

Are the parties in a de facto relationship at the time of application?

7. As the parties were not married to each other under a marriage that is valid for the purposes of the Act at the time of application, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).

8. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
9. In making findings in relation to the time of application I have considered the subsequent history of the relationship and espoused the principles applied in *Bretag v MILGEA [1991] FCA 582*. I have considered the evidence of the subsequent history of the relationship of the parties so long as it tends to show the existence or nonexistence of issues to be determined at the time of application.

10. *The applicant's employment history*

11. One of the issues of credibility for the delegate in the Department's decision record dated 19 October 2016, was the applicant provided a form 80 in which she provided her employment details in part F, question 19. The applicant recorded that from January 2016 to May 2016 she was employed as a farmhand by Agri Labour, Australia and gave their address is Toowoomba Queensland. The applicant and sponsor had also submitted that they met in Tasmania in January 2016, and moved in to live together in Tasmania in April 2016. The applicant provided a lease document for a Tasmanian property, and correspondence addressed to the Tasmanian address. The delegate found the information to be inconsistent and the evidence to lack credibility.
12. The tribunal has been provided with 16 payslips from Agri Labour Australia for the applicant over the period January to May 2016. All payslips have the employer's Toowoomba Queensland address on the payslip. All the payslips have the applicant's name on them and her address. The payslips from January up until 2 April 2016 records the applicant's address at a C Street residence in Devonport Tasmania, and from 14 April 2016 record the applicant's address as S Street, in Devonport. The Form 80 requires the applicant to provide the full address of the business/company providing the employment, and does not require her to provide to the full address of her actual employment.
13. The applicant provided the tribunal with a letter from the director of Agri labour Australia dated 31 October 2016 which confirmed that the applicant was employed by the company from January 2016 in Tasmania. The author of the letter confirmed that he met the applicant in Tasmania in April 2016.
14. I am satisfied that the applicant resided in Tasmania from January to May 2016, as claimed by both her and the sponsor. Further, I am satisfied that the applicant has filled in the Form 80 as required, and recorded the correct address of her employer as it was recorded on her payslips.
15. I accept based on further payslips provided and statements made by the sponsor of that the applicant did work in New South Wales for a very short period in late May 2016 as was also recorded on the Form 80.

16. *The financial aspects of the relationship*

17. I have considered the information provided both to the Department and to the Tribunal. I am satisfied that the parties moved in to the address at S Street in Devonport in April 2016. I accept the parties resided at this address as tenants. I accept the parties opened a joint bank account in April 2016. I accept both parties were working for Agri Labour Australia. I am satisfied based on the written evidence before me that the parties pooled their financial resources, and shared their day-to-day household expenses from April 2016.

18. I accept based on the evidence before me, the parties do not jointly own real estate or other major assets. I accept the parties do not have any joint substantial liabilities. I accept that neither of the parties in the relationship has a legal obligation in respect of the other.
19. The evidence of the financial aspects of the relationship indicates that the parties are in a genuine and continuing relationship, both at the time of application and the time of decision.

20. The nature of the parties' household

21. I am satisfied based on the statements from the applicant and the sponsor provided to the Department and the statutory declarations of the sponsor's sister and mother and stepfather, and the statement of the sponsor provided to the tribunal, that the parties have resided together and managed their household since April 2016. I am satisfied that the parties have shared the responsibility for the house work since April 2016.
22. I have also considered the birth certificate and accept the parties had a daughter born in May 2018. I accept the parties have joint responsibility for the care and support of the child.
23. The evidence of the nature of the household indicates that the parties are in a genuine and continuing relationship, that they have a mutual commitment to a shared life to the exclusion of all others, and that they lived together, and not separately and apart, on a permanent basis, both at the time of application and at the time of decision.

24. The social aspects of the relationship

25. I have considered the statements and statutory declarations of the mother, stepfather and sister of the sponsor. I have considered the statements of the parties. I have considered the photographs. I have considered the personal cards and personal correspondence. I have considered the statutory declarations of people who have worked with the parties. I have also considered the applicant and sponsor were married in Tasmania on 26 March 2017, and have a child who was born in May 2018.
26. I accept the evidence that the parties represented themselves to other people as being in a de facto relationship with each other prior to March 2017, and subsequently the evidence that the parties represented themselves to other people as being in a married relationship. I accept the written evidence before me that the parties' friends, work colleagues and relatives consider their relationship to be a genuine, happy and committed relationship.
27. I accept the parties have travelled together within Australia. I accept the parties socialise together. I accept the parties have planned a life together including setting up their house, marrying and having a child.
28. The evidence of the social aspects of the relationship indicates that the parties are in a genuine and continuing relationship, and that they have a mutual commitment to a shared life to the exclusion of all others, and that they lived together, and not separately and apart, on a permanent basis, both at the time of application and the time of decision.

29. Nature of the parties' commitment to each other

30. I accept based on the evidence before me that the duration of the relationship at the time of application was six months and at the time of this decision is 2 ½ years. I accept the parties have lived together for the same period of time, namely six months at time of application, and for 2 ½ years at the time of this decision.

31. Based on the evidence contained in the statutory declarations of family members, friends and work colleagues and on the information contained in the statements of the parties, I accept that the applicant and sponsor provide companionship and emotional support to each other. I give weight to the fact the parties have married and have had a daughter. I accept that the parties see their relationship as a long-term relationship.

32. The evidence of the nature of the parties' commitment to each other indicates that the relationship is genuine and continuing, that the parties have a mutual commitment to a shared life to the exclusion of all others, and that they lived together, and not separately and apart, on a permanent basis, at both the time of application and at the time of decision.

33. *Whether the parties are related by family*

34. I have considered the birth certificates of both the sponsor and the applicant. I am satisfied that the parties are not related by family.

35. *Time of Application de facto relationship findings*

36. I have considered all the circumstances of the relationship as set out in r.1.09A(3)(a)-(d). I am satisfied that the parties are in a genuine and continuing relationship, that they have a mutual commitment to a shared life to the exclusion of all others, that they lived together, and not separately and apart, on a permanent basis, and that they are not related by family. For these reasons I find that the time of application the applicant is in a de facto relationship with the sponsor and meets the requirements of s.5CB(2).

37. I find that the applicant is the de facto partner of a person who is an Australian citizen at the time of application. The applicant meets the requirements of cl.820.211(2)(a).

38. *Sponsorship requirements*

39. I am satisfied it that at the time of application the applicant is the de facto partner of the sponsor. I have considered the sponsorship forms and I have considered the identification documents of the sponsor. I am satisfied that the sponsor has turned 18. I find the applicant is sponsored by her de facto partner who is turned 18, and therefore she meets the requirements of cl.820.211(c).

40. *Substantive Visa holder*

41. There is no evidence before me to indicate that the applicant was not the holder of a substantive visa at the time of application, and therefore the requirements of cl.820.211(2)(d) do not apply.

42. For the above reasons I find the applicant meets the requirements of cl.820.211(2)(a),(c) and (d), and therefore she meets cl.820.211(2).

43. On the basis of the above the tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made.

44. *Time of decision spousal relationship findings*

45. I am satisfied that on 26 March 2017 the applicant and the sponsor were married in Tasmania. I am satisfied that applicant and sponsor are validly married for the purposes of the Act.

46. For the reasons set out above I am satisfied that at the time of decision the applicant was in a genuine and continuing relationship with the sponsor, that they have a mutual commitment to a shared life to the exclusion of all others, and that they lived together, and not separately and apart, on a permanent basis.
47. Therefore I find the time of decision the applicant is in a spousal relationship with the sponsor and meets the requirements of s.5F(2)(a)-(d).
48. I find at the time of decision the applicant is the spouse of the sponsor and continues to meet the requirements of cl.820.211(2). Therefore the applicant meets the requirements of cl.820.221.
49. Accordingly, the applicant meets cl.820.211(2) and cl.820.221.

Are the additional criteria for a de facto relationship met?

50. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
51. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
52. The applicant has provided evidence that the relationship is registered under the Relationships Act 2003 (Tasmania) as a kind of relationship prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: r.2.03A(5). Accordingly, the 12 month requirement does not apply.
53. For these reasons the tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
54. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

55. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2) and cl.820.221 of Schedule 2 to the Regulations; and
 - r.2.03A.

56.

Margie Bourke
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or

- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.